

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
December 17, 2008 Session

DANIEL E. BUCK v. STATE OF TENNESSEE

Appeal from the Circuit Court for Robertson County
No. 04-0249 John H. Gasaway, III, Judge

No. M2008-00283-CCA-R3-PC - Filed June 9, 2009

A jury convicted Petitioner of aggravated rape and aggravated sexual battery. He was sentenced to an effective sentence of fifteen years. Petitioner's direct appeal from his conviction was unsuccessful. *State v. Daniel Buck*, No. M2005-02818-CCA-R3-CD, 2006 WL 3831390 (Tenn. Crim. App., at Nashville, Dec. 12, 2006), *perm. app. denied*, (Tenn. Apr. 23, 2007). He subsequently filed a petition for post-conviction relief based upon ineffective assistance of counsel. At the post-conviction hearing, the post-conviction court determined that the issue was previously determined and waived. Because we conclude that Petitioner's issue has not been heard at a meaningful time in a meaningful manner, we reverse and remand this case to the post-conviction court for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Reversed and Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Gregory D. Smith, Clarksville, Tennessee, for the appellant, Daniel E. Buck.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; John Carney, District Attorney General, and Dent Morriss, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Based upon incidents that occurred on January 11 and 12 of 1991, Petitioner was charged with aggravated rape and aggravated sexual battery. *Daniel Buck*, 2006 WL 3831390, at *1. Between the dates of the crime and the grand jury's return of the presentment in April of 1991, Petitioner relocated to Michigan. When he arrived in Michigan, he was convicted of two sexual

offenses against a minor and sentenced to the penitentiary. *Id.* While in Michigan, Petitioner refused voluntary extradition to Tennessee to face the charges from 1991. There was ongoing correspondence between the Robertson County District Attorney's Office and the Michigan authorities until Petitioner's release after serving his nine to fifteen-year sentence in Michigan. *Id.* at *2.

Upon Petitioner's release, he was transported to Tennessee. When he was returned, it was discovered that his 1991 presentment was defective. *Id.* Thereupon, the victim, who had reached majority, testified in front of the Robertson County Grand Jury in July of 2004 and a superseding indictment replaced the earlier indictment. *Id.* On February 8, 2005, Petitioner was convicted by a jury of aggravated rape and aggravated sexual battery. *Id.* The trial court sentenced Petitioner to fifteen years for the aggravated rape and eight years for the aggravated sexual battery. These sentences were ordered to run concurrently to each other. *Id.* Petitioner's sole issue on direct appeal was that the trial court erred in denying his motion to dismiss based upon an alleged violation of his right to a speedy trial. *Id.* at *2. This Court affirmed the trial court's denial.

On May 2, 2007, Petitioner filed a Petition for Post-conviction Relief. In his petition, Petitioner argued two pertinent issues for purposes of post-conviction relief: (1) that he was afforded ineffective assistance of counsel because trial counsel failed to file a motion for new trial to preserve his issue that his convictions were barred by the statute of limitations; and (2) that appellate counsel was ineffective because he did not raise the issue of the statute of limitations on appeal through plain error. On June 28, 2007, the trial court appointed post-conviction counsel for Petitioner. On July 23, 2007, new counsel was appointed. On July 25, 2007, the trial court filed an order allowing for substitution of counsel who represented Petitioner at the post-conviction hearing. An amended petition was not filed prior to the hearing.

On January 11, 2008, the post-conviction court held a hearing. At the hearing, the State argued that Petitioner's issues either did not make a factual allegation or had been pre-determined. There was some discussion by the post-conviction court and the attorneys concerning what issues were viable. Petitioner's attorney stated that the only possible argument was regarding the statute of limitations. Petitioner's attorney admitted that he had no new evidence to present regarding the statute of limitations issue. At this point, the trial court stated that all issues were either waived or previously determined. Petitioner's attorney agreed with the assessment. The post-conviction court concluded the hearing by denying the petition.

Petitioner filed a timely notice of appeal.

ANALYSIS

On appeal Petitioner essentially argues that he was afforded ineffective assistance of counsel for post-conviction proceedings and that this matter should be remanded for a hearing on the merits of the petition. The State argues that Petitioner's issues are waived on appeal.

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issue raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

There is no constitutional right to representation by counsel in post-conviction proceedings and therefore, no right to effective assistance of counsel in post-conviction proceedings. *House v. State*, 911 S.W.2d 705, 712 (Tenn. 1995). However, there is a statutory right to counsel. *See* T.C.A. § 40-30-207(b)(1). "The appointment of counsel assists in ensuring that a petitioner asserts all available grounds for relief and fully and fairly litigates these grounds in a single post-conviction proceeding." *Leslie v. State*, 36 S.W.3d 34, 38 (Tenn. 2000). In *House v. State*, 911 S.W.2d 705 (Tenn. 1995) our supreme court stated, "All that due process requires in the post-conviction setting is that the defendant had "the opportunity to be heard at a meaningful time and in a meaningful manner.'" 911 S.W.2d at 711 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976))." Our supreme court reiterated this statement in *State v. Stokes*, 146 S.W.3d 56, 61 (Tenn. 2004).

In *Leslie*, our supreme court stated the obligations of post-conviction counsel:

We have summarized the obligations and responsibilities of a post-conviction attorney as follows:

Appointed or retained counsel shall be required to review the pro se petition, file an amended petition asserting other claims which petitioner arguably has or a written notice that no amended petition will be filed, interview relevant witnesses, including petitioner and prior counsel, and diligently investigate and present all reasonable claims.

Tenn. Sup. Ct. R. 28, § 6(C)(2). Counsel is also to file a certification indicating that he or she has thoroughly investigated the possible constitutional violations with the petitioner, and has raised all non-frivolous constitutional grounds warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Tenn. Sup. Ct. R. 28, § 6(C)(3), app. C.

The post-conviction court determined that the issue was waived because post-conviction counsel stated that he did not have any additional evidence to present and conceded the issue. Initially, we note that post-conviction counsel did not file an amended petition for post-conviction relief or a certification that an amended petition would not be filed. At the hearing, post-conviction counsel stated that he was ready to proceed on the statute of limitations issue, but he did not have any additional evidence to present. The post-conviction court then denied the petition based upon the conclusion that the issues had been previously determined or were waived.

As stated above, a petitioner is not entitled to effective assistance of post-conviction counsel and, therefore, is not entitled to a second post-conviction hearing based upon post-conviction counsel's ineffectiveness. Therefore, post-convictions counsel's failure to meet the requirements as set out in both case law and court rules does not entitle Petitioner to a second hearing. However, the post-conviction court also concluded that Petitioner's statute of limitations issue had been previously determined by this Court on direct appeal. This conclusion is clearly erroneous. While Petitioner was allowed a delayed appeal to this Court, the only issue addressed was whether Petitioner's right to a speedy trial was violated. Petitioner's statute of limitations issue has not been addressed by any court other than the trial court in a pretrial motion to dismiss. Therefore, it has not been previously determined. The question of whether trial counsel was ineffective and the ramifications of trial counsel's failure to include the statute of limitations issue in a motion for new trial would seem to be a very pertinent question in this situation. Therefore, we conclude that Petitioner's issue has not been heard at a meaningful time in a meaningful manner.

We make no determinations as to the viability of Petitioner's statute of limitations issue but conclude that the issue should be given a full hearing and determination by the post-conviction court.

CONCLUSION

For the foregoing reasons, we reverse the determination of the post-conviction court and remand for further proceedings in accordance with this opinion.

JERRY L. SMITH, JUDGE